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ALEXANDER L. STEVAS,
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1982 TERM

EDWARD ENNIS,

Petitioner,

vs.

STATE OF NORTH DAKOTA,

Respondent.

PETITION FOR WRIT OF CERTIORARI ON APPEAL
FROM THE NORTH DAKOTA SUPREME COURT

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IN THE COURTS BELOW

The opinion of the Supreme Court of North Dakota is not yet reported. It is attached hereto as Appendix A.

JURISDICTIONAL STATEMENT

On May 26, 1983, the Supreme Court of North Dakota filed its opinion in the instant case. On June 24, 1983, the Supreme Court of North Dakota entered its Order denying Defendant's Petition for Rehearing. 28 U.S.C. § 1257 confers on this Court jurisdiction to review the decision below by Writ of Certiorari. See Grannis v. Ordean, 234 U.S. 385, 392 (1914).

RELEVANT CONSTITUTIONAL PROVISION

U.S. CONST. Amend. XIV, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE
SUPREME COURT OF THE UNITED STATES
No. _____
OCTOBER 1982 TERM

EDWARD ENNIS,

Petitioner,

vs.

STATE OF NORTH DAKOTA,

Respondent.

PETITION FOR WRIT OF CERTIORARI ON APPEAL
FROM THE NORTH DAKOTA SUPREME COURT

STATEMENT OF CASE

On April 8, 1982 Petitioner Edward Ennis was charged in five Complaints with unlawful possession of marijuana with intent to deliver, and unlawful delivery of hashish and marijuana, in violation of North Dakota

law. Petitioner pleaded not guilty to all charges, and the five Complaints were consolidated for trial before the Honorable Bert L. Wilson of the North Dakota District Court. A bench trial commenced on July 29, 1982.

At trial, the State called as an expert witness Mr. Aaron Rash, the supervisor of the North Dakota Crime Laboratory, Bismark. Through Mr. Rash, the State introduced into evidence the lab report regarding the substances allegedly sold by, and seized from, Petitioner, and Mr. Rash identified these substances as Cannabis (T. /¹ 221-22, 268). Rash testified that he relied upon four laboratory tests in identifying the samples in question: microscopic examination

¹ "T." refers to the trial transcript.

of the plant materials for botanical characteristics; Duquenois-Levine; thin-layer chromatography; and infrared spectroanalysis (T. 223).

On cross examination, the defense established that Mr. Rash had received no botanical training, whatsoever (T. 246). Further, while Mr. Rash relied upon the results of an infrared spectroanalysis to reach his conclusion that there was Tetrahydrocannabinol (THC) present in the materials examined, he could not explain the theoretical or practical workings of the infrared spectrophotometer used in obtaining the analysis (T. 406).

The defense called its own expert witness, Dr. Dwight Fullerton, to testify regarding drug identification. Dr. Fullerton has obtained degrees in chemistry and pharmacy, is a licensed pharmacist, and has

taken many courses in botany and pharmacognosy, the study of drug-containing plants. He has taught courses in forensic analysis and has written articles on the identification of unknown substances believed to be marijuana (T. 323-33).

Through Dr. Fullerton's testimony and the cross-examination of Mr. Rash, the defense underscored Rash's incompetence to render a conclusive identification of the sample substances. With respect to marijuana's botanical characteristics, Dr. Fullerton testified that there are four distinct hairs on the marijuana plant (T. 345), and that the glandular hairs appear on the bottom side of the leaf while the cystolith hairs are on the top of the leaf (T. 345-46). Dr. Fullerton indicated that if the cystolith and glandular hairs appear on the same side of a plant's leaf, that plant

is not likely to be marijuana (T. 346). For purposes of forensic analysis, Dr. Fullerton testified that one cannot distinguish the top of a leaf from the bottom simply by color, but must refer to the volume of "stoma," or breathing holes, on each side of the sample, or must do further microscopic analysis (T. 347).

Mr. Rash, having no botanical training, testified that he observed the cystolith and glandular hairs on the same side of the leaves in the samples examined (T. 245), and asserted that this positioning of the hairs supported his contention that the substances were marijuana (T. 245). He admitted that the placement of hairs vis-a-vis the top or bottom of the leaf is important in identifying a plant as marijuana, claimed that "most of the time" one could tell the difference from the top and bottom just by

the color of the leaf, but admitted that he did not know how the tops of the leaves had been distinguished from the bottoms in the case of these samples (T. 245-46).

Dr. Fullerton also testified that the Duquenois-Levine test is nonspecific and inaccurate because many plants contain the chemical resorcinol, which triggers a positive reaction in the test (T. 350). Further, he stated that the four spectra charts prepared from the infrared spectroanalysis on these samples were inconsistent with the reference spectra for THC, and that the four charts were themselves internally inconsistent (T. 376-78).

Defense counsel raised objection to the opinions of Mr. Rash, and sought a directed verdict at the close of the State's case in chief, claiming that Rash was incompetent to render an expert opinion on the identity of

the substances in question and that Rash's testimony was insufficient to establish the offense (T. 222, 276-80). The trial court rejected Petitioner's contentions (T. 222, 289).

At the conclusion of testimony and argument, Judge Wilson found the Petitioner guilty of all charges (T. 439). In rendering his verdict, the Judge noted that "there is doubt, but not beyond a reasonable doubt. And my only doubt is in the chemical analysis; that bothered me some, but it's not beyond a reasonable doubt" (T. 439).

Following denial of Petitioner's motion for a new trial, he was sentenced on August 9, 1982 to imprisonment for seven years with four years suspended, and fined \$5,000. Petitioner's Notice of Appeal to the North Dakota Supreme Court was filed on August 9, 1982.

On his appeal, Petitioner asserted, inter alia, that the evidence introduced by the State was insufficient to identify the substances in question as marijuana or hashish (Appendix A, page 16), and that the trial court had a reasonable doubt regarding identification of the substances in question which mandated a reversal under the Due Process Clause of the Fourteenth Amendment (Appendix A, page 31, n. 5).

The Supreme Court of North Dakota reversed Petitioner's conviction for unlawful possession of marijuana with the intent to deliver and affirmed his convictions for unlawfully delivering hashish and marijuana. State of North Dakota v. Ennis, Crim. Nos. 885, 895, 896, 897, 898 (May 26, 1983). The court refused to overturn Petitioner's conviction based on the drug identification issue. With respect to Petitioner's

Constitutional claim that the trial court had a reasonable doubt regarding identification of the substances in question, the North Dakota Supreme Court concluded that "the testimony of defendant's expert, Dr. Fullerton, created some question in the trial court's mind; however, such conflicting evidence did not create a 'reasonable doubt'." (Appendix A, page 31, n. 5).

As for its own review of the evidence concerning identification of the substances, the court noted:

The defense presented strong contradictory evidence, all of which was directed toward proving that Aaron Rash was inept and that the tests performed in the State Laboratory were both inadequate and inconclusive. Defense counsel, however, did not offer evidence of independent tests performed by an expert in which the substances were shown to not be marijuana or hashish.

Appendix A, page 19 (emphasis added). In

analyzing Petitioner's attack on the adequacy of the identification evidence, the court stated:

The crux of Dr. Fullerton's testimony was that, based on the State Laboratory's analysis, it is impossible to positively identify the substances as marijuana or hashish. However, on cross examination, Dr. Fullerton admitted that he was not stating nor could he state that the substances analyzed were not marijuana or hashish.

Appendix A, pages 17-18 (emphasis added).

On June 6, 1983, Petitioner submitted his Petition for Rehearing to the Supreme Court of North Dakota. At page 5 of his Petition for Rehearing, Petitioner raised the following claim under the United States Constitution:

This Court, in its opinion, unfairly shifted the burden of proof to the defendant.

At page 10 of this Court's decision, it was twice mentioned that the expert for the defense,

Dr. Fullerton, (a) was not stating the substances were not marijuana; and (b) did not offer evidence of independent tests performed in which the substances were shown to not be marijuana.

It is respectfully submitted that it is a denial of due process, in violation of the United States Constitution and the North Dakota Constitution, to require the defendant to produce any evidence such as was noted lacking by this Court in its opinion.

* * * * *

Dr. Fullerton was fully versed in the practical and theoretical workings of the infrared analytical device, as well as being a trained botanist. As the only "competent" expert to render an opinion, therefore, upon the exhibits produced, which opinion without hesitation indicated the evidence was insufficient to identify the substance, is all the burden this Court can constitutionally put upon a defendant [sic]. It is not necessary that the defendant conduct independent tests and bring such data to the courtroom.

On June 24, 1983, the Supreme Court of North Dakota entered an Order denying the Petition for Rehearing. It is from the decision of that court that the instant petition arises.

ARGUMENT

- I. BY IMPOSING ON PETITIONER THE BURDEN OF PROVING THAT THE SUBSTANCES UNDER EXAMINATION WERE NOT MARIJUANA, THE NORTH DAKOTA SUPREME COURT IMPROPERLY SHIFTED THE BURDEN OF PROOF AND THEREBY VIOLATED PETITIONER'S DUE PROCESS RIGHTS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In refusing to overturn Petitioner's conviction based upon his drug identification argument, the North Dakota Supreme Court placed great weight on the fact that Petitioner did not disprove the State's contention that the substances in question were marijuana.

The crux of Dr. Fullerton's testimony was that, based on the State Laboratory's analysis, it is impossible to positively identify the substances as marijuana or hashish. However, on cross-examination, Dr. Fullerton admitted that he was not stating nor could he state that the

substances analyzed were not marijuana or hashish.

Appendix A, pages 17-18 (emphasis added).

Viewed in its entirety, the opinion reveals an improper shifting of the burden of proof to the Petitioner which violated his due process right to a presumption of innocence. While there is general, boiler-plate language regarding the Court's unwillingness to substitute its own judgment for a trial judge's determination supported by substantial evidence, Id. at 18, the court pointed to no specific substantial evidence in the record before it. Where it did refer to Mr. Rash's testimony that his laboratory tests identified the substances as marijuana and hashish (Appendix A, page 16), at the same time the court noted that:

[t]he defense presented strong contradictory evidence, all of which was directed toward proving that Aaron Rash was inept and that

the tests performed in the State Laboratory were both inadequate and inconclusive.

Id. at page 19 (emphasis added). Again, however, the court made perfectly clear its view that Petitioner was obliged to do more than attack the substantiality of the State's evidence:

Defense counsel, however, did not offer evidence of independent tests performed by an expert in which the substances were shown to not be marijuana or hashish.

Id. (emphasis added)

The presumption of innocence and the harsh burden of proof placed on the State in criminal cases are two of the oldest and most fundamental rights protected under the Constitution, see, e.g., Coffin v. United States, 156 U.S. 432 (1895), and are basic components of a fair trial under our criminal justice system. Estelle v. Williams, 425 U.S. 501, 503 (1976). The presumption of

innocence has been specifically recognized as a requirement of due process. Hernandez v. Beto, 443 F.2d 634 (5th Cir.), cert. denied, 404 U.S. 897 (1971); United States v. Thoresen, 428 F.2d 654, 661 (9th Cir. 1970); Government of Virgin Islands v. Lake, 362 F.2d 770, 774 (3d Cir. 1966); Bentley v. Crist, 469 F.2d 854, 855 (9th Cir. 1972). This presumption in favor of the accused is undoubted law, axiomatic and elementary, and lies at the foundation of the administration of our criminal law. Taylor v. Kentucky, 436 U.S. 478, 483 (1978). It follows from this presumption that the accused has no burden of presenting evidence. Woods v. Estelle, 547 F.2d 269, 271 (5th Cir. 1977).

[I]t is technically possible for a criminal defendant to enter a plea of not guilty, introduce little or no evidence in his own defense, and rely exclusively on his presumption of innocence and the possible inability of the

prosecution to prove his guilt
beyond a reasonable doubt.

United States v. England, 347 F.2d 425, 431
(7th Cir. 1965).

These principles are fundamental and demand strict adherence. Even the imposition of the slightest burden of proof on a defendant cannot be sustained under our Constitution. See, Smith v. Smith, 454 F.2d 572, 577-78 (5th Cir. 1971), cert. denied, 409 U.S. 885 (1972). "The burden of proof must be on the state throughout; not sometimes on the state, and sometimes on the defendant." Wilbur v. Mullaney, 496 F.2d 1303, 1307 (1st Cir. 1974), affirmed, 421 U.S. 684 (1975) (emphasis added). In United States v. Harrigan, 586 F.2d 860 (1st Cir. 1978), the First Circuit Court of Appeals ruled that it was plain error for the trial judge to instruct the jury as follows: "I

say the only question with respect to the defendant's evidence is whether it creates a reasonable doubt." The First Circuit concluded that such an instruction improperly suggested to the jury that the defendant was obliged to present evidence of his innocence. 586 F.2d at 862-63. In Stump v. Bennett, 398 F.2d 111 (8th Cir.), cert. denied, 393 U.S. 1001 (1968), the Eighth Circuit held that a jury instruction which required the defendant to establish his alibi by a preponderance of the evidence improperly shifted the burden of proof, conflicted with the presumption of innocence, and violated due process. 398 F.2d at 116; accord, Johnson v. Bennett, 414 F.2d 50 (8th Cir. 1969); Smith v. Smith, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885 (1972).

In its review of the record before it, the North Dakota Supreme Court failed to bear

in mind the presumption of innocence in favor of Petitioner. While the reviewing court's function with respect to factual findings is limited, under North Dakota law such a court is empowered to overturn factual determinations which are not supported by substantial evidence. State v. Olmstead, 246 N.W.2d 888, 890 (N.D. 1976), cert. denied, 436 U.S. 918 (1978); accord, Kresel v. Giese, 231 N.W.2d 780, 791 (N.D. 1975). Here, the language of the opinion indicates that no matter how insubstantial an accused reveals the State's evidence to be, the appellate court will not overturn his conviction unless the accused has affirmatively presented contrary evidence. Such an interpretation at the appellate level thoroughly undermines the presumption of innocence at the trial stage.

Through the cross examination of Mr. Rash and the expert testimony of Dr.

Fullerton, Petitioner established the incompetence of the State's expert witness to make a conclusive identification of the relevant substances. Mr. Rash's testimony was the only evidence presented by the State to establish an essential element of the offense charged -- the identity of the substance obtained as that prohibited by statute. On appeal, it was the duty of the North Dakota Supreme Court to review the trial record and determine whether the defense so clearly established Mr. Rash's incompetence as an expert as to render the identification evidence "insubstantial." Such an effort by the defense did not require the presentation of evidence regarding the specific identity of the substance under examination.

There is always in litigation a margin of error, representing error in fact finding, which both

parties must take into account. Where one party has at stake an interest of transcending value -- as a criminal defendant his liberty -- this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the fact finder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the fact finder of his guilt.

Speiser v. Randall, 357 U.S. 513, 525-26
(1958).

The opinion by the Supreme Court of North Dakota reflects a shifting of the burden of proof. Because Petitioner did not present evidence which affirmatively identified the substance in question, the court refused to adequately consider his claim that the drug identification evidence was insufficient. Such an approach undermined the presumption of innocence in

favor of Petitioner and denied to him his due process rights under the Fourteenth Amendment to the United States Constitution.

II. BY REQUIRING THAT THE EVIDENCE
RAISE MORE THAN A REASONABLE
DOUBT OF PETITIONER'S
INNOCENCE, THE TRIAL COURT
COMMITTED PLAIN ERROR AND
VIOLATED PETITIONER'S DUE
PROCESS RIGHTS UNDER THE
FOURTEENTH AMENDMENT TO THE
UNITED STATES CONSTITUTION.

At the close of testimony and argument, the trial judge entered his verdict, stating that the Petitioner was guilty beyond a reasonable doubt of the offenses charged. Further, Judge Wilson specifically reflected on the issue of the drug identification:

[T]here is doubt, but not beyond a reasonable doubt, and my only doubt is in the chemical analysis; that bothered me some, but it is not beyond a reasonable doubt . .
. .

T. 439 (emphasis added). While Judge Wilson

raised the talisman of "guilt beyond a reasonable doubt" in rendering his verdict, his comments regarding the chemical analysis reflect his misapplication of that standard. Those comments reveal that the Petitioner was convicted of the crimes charged because the evidence failed to raise more than a reasonable doubt in the mind of the judge that the substances under examination were not marijuana.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In Re Winship, 397 U.S. 358, 364 (1970). Under this standard, the State bears the burden of persuading the fact finder at the conclusion of the trial that every element of the crime with which the accused is charged has been established

beyond a reasonable doubt. Id.; see Speiser v. Randall, 357 U.S. 513, 525-26 (1958). The First Circuit has noted that the discussion of the reasonable doubt standard is perhaps the most important aspect of the closing instruction to the jury in a criminal case, Dunn v. Perrin, 570 F.2d 21, 25 (1st. Cir.), cert. denied, 437 U.S. 910 (1978), and this Court emphasized the constitutional importance of the reasonable doubt standard in Taylor v. Kentucky, 436 U.S. 478 (1978). The standard provides concrete substance for the presumption of innocence, the bedrock axiomatic and elementary principle which lies at the foundation of the administration of our criminal law. In Re Winship, 397 U.S. at 363.

Under this principle, it follows that the accused is entitled to an acquittal of the specific crime charged if there is, in

the mind of the fact finder, a reasonable doubt with respect to any fact necessary to constitute the crime. See, Davis v. United States, 160 U.S. 469, 484, 493 (1895).

Because application of the correct burden of proof is so essential to the proper administration of our criminal law, there is no room for the slightest deviation from the standard. In United States v. Alvero, 470 F.2d 981 (5th Cir. 1972), use of the phrase "very substantial doubt" to explain reasonable doubt to the jury was deemed reversible error, not overcome by an otherwise proper explanation in the charge and a curative instruction. See also, United States v. Flannery, 451 F.2d 880 (1st Cir. 1971) (erroneous use of phrase "strong and abiding conviction" to define reasonable doubt). In United States v. Pine, 609 F.2d 106 (3d Cir. 1979), the Third Circuit

rejected an instruction which said that the case involved a question of fact, and that the basic question was to determine who was telling the truth, concluding that such an approach ran counter to the requirement of proof beyond a reasonable doubt. 609 F.2d at 108.

In the instant case, Judge Wilson served as fact finder. In the trial of a case to the court without a jury, the trial judge must follow the principles set forth in the instructions that would be applicable were the case being tried to a jury.

Lockhart v. O'Hara, 380 F.Supp. 379 (W.D.Ark. 1974). It is quite clear from his comments that Judge Wilson misapplied the reasonable doubt standard in rendering his guilty verdict, and in the face of those comments, the North Dakota Supreme Court erred in concluding that he had nonetheless applied

the proper standard of proof. It is not enough to argue that Judge Wilson simply chose his words carelessly, as evidenced by his reference elsewhere to "guilt beyond a reasonable doubt." In United States v. Harrigan, 586 F.2d 860 (1st Cir. 1978), the First Circuit refused to find that an erroneous instruction was rendered harmless because the charge elsewhere did state the burden of proof standard correctly. "This was not an obvious misstatement or the careless use of words. The district court was convinced at the time of the correctness of its statement." 586 F.2d at 863. See Dunn v. Perrin, 570 F.2d 21, 25 (1st Cir.), cert denied, 437 U.S. 910 (1978).

Read within their context, Judge Wilson's comments indicate that the testimony of Dr. Fullerton, Petitioner's expert, raised reasonable doubts in the judge's mind

regarding the identity of the incriminating substances, but that the Judge believed those doubts had to be more than reasonable in order to acquit:

It was a very well-tryed lawsuit. I enjoyed listening to it and presiding over it. You both [the attorneys] acted like gentleman and lady, the way they should, and very educational as well [sic]; particularly, Dr. Fullerton. It was an education itself just listening to his testimony, and the other witnesses as well. I think they all tried to tell the truth as they remember the truth.

It is my judgment that the defendant is guilty of the charge of delivery of controlled substance, marijuana, on the second of September, 1981, Criminal Case Number 4071. He's also guilty of the charge of delivery of a controlled substance, hashish, Criminal Case Number 4068, on the 28th day of September, 1981. He's also guilty beyond a reasonable doubt, there is a doubt, but not beyond a reasonable doubt. And my only doubt is in the chemical analysis; that bothered me some, but it's not beyond a reasonable doubt of the offense charged on the 23rd day of September, 1981. . . .

T. 439 (emphasis added).

By demanding that the evidence raise questions "beyond a reasonable doubt," Judge Wilson subjected petitioner to "a dubious and unjust conviction, Brinegar v. United States, 338 U.S. 160, 174 (1949), thereby violating his fundamental right to due process of law. When a trial error infringes on constitutional rights, the appellate court must reverse unless it finds that the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967). Such doubt can be raised by a "reasonable possibility that the evidence complained of might have contributed to the conviction." Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963).

In the case at bar, Judge Wilson's misapplication of the reasonable doubt standard with respect to a fact necessary to constitute the crime not only contributed to,

but produced Petitioner's conviction. This plain error violated Petitioner's due process rights and dicates that his conviction be reversed. In Re Winship, 397 U.S. 358 (1970); Davis v. United States, 160 U.S. 304 (1881).

CONCLUSION

For the reasons set forth above, this Court should reverse the judgment of the Supreme Court of North Dakota.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,

Plaintiff and Appellee

v.

[Filed by Clerk
Supreme Court
May 26, 1983]

Edward Ennis,

Defendant and Appellant

Crim. Nos. 885, 895, 896, 897, 898

Appeal from the District Court of
Williams County, Northwest Judicial District,
the Honorable Bert L. Wilson, Judge.

REVERSED IN PART AND AFFIRMED IN PART.

Opinion of the Court by Erickstad,
Chief Justice.

Kent Reiersen, States Attorney,
Courthouse, P. O. Box 1247, Williston, ND

58801, for plaintiff and appellee; argued by Kent Reiersen.

Kurzman, Shapiro, Manahan & Partridge, 601 Bulter Square, 100 North 6th Street, Minneapolis, MN 55403-1579, and Bjella, Neff, Rathert, Wahl and Eiken, P.O. Box 1526, Williston, ND 58801, for defendant and appellant; argued by Marc G. Kurzman and Richard G. Carver.

State v. Ennis
Crim. Nos. 885, 895, 896, 897, 898

ERICKSTAD, Chief Justice.

Defendant/Appellant, Edward G. Ennis, was charged with and ultimately adjudged guilty in a bench trial of five separate offenses: possessing a controlled substance, five pounds of marijuana, with the intent to deliver, § 19-03.1-23(1)(b), N.D.C.C., §

19-03.1-05(4)(o), N.D.C.C.; unlawfully delivering a controlled substance, hashish, to Kevin Ostberg on September 23 and 28, 1981, § 19-03.1-23(1)(b), N.D.C.C., § 19-03.1-05(4)(l), N.D.C.C.; unlawfully delivering a controlled substance, marijuana, to Rene' Ostberg on September 2, 1981, § 19-03.1-23(1)(b), N.D.C.C., § 19-03.1-05(4)(o), N.D.C.C.; and, unlawfully delivering a controlled substance, hashish, to Rene' Ostberg on September 9, 1981, § 19-03.1-23(1)(b), N.D.C.C., § 19-03.1-05(4)(l), N.D.C.C. Subsequent thereto, a judgment of conviction, dated August 9, 1982, was entered by the District Court of Williams County from which Ennis now appeals. For the reasons hereinafter stated, we reverse Ennis' conviction of unlawfully possessing marijuana with the intent to

deliver and affirm his convictions with regard to delivering hashish and marijuana to Rene' and Kevin Ostberg.

I. SUPPRESSION MOTION

On April 7, 1982, the County Judge of Williams County issued a warrant to search Ennis' home. The sole basis for this warrant was a sworn affidavit submitted to the county judge by Jim Quickstad, a lieutenant detective in the Williams County Sheriff's office. The pertinent part of Quickstad's affidavit¹ is paragraph four:

4. March of 82, a Confidential informant who has given information in the past leading to under cover purchases of drugs and who has given information known by Jim Quickstad to be true and reliable about Drug Dealers told to Jim Quickstad that Ed Ennis had 10lbs [sic] of Marijuana in his home on April 7, and has been selling Marijuana from this 10 lbs. Ed Ennis told the confidential informant that the 10 lbs of

marijuana were at his home at 1309
24th stW and could be bought there"

Pursuant to this warrant, the Williams County Sheriff's office searched Ennis' home and found five zip-lock bags² containing a substance alleged to be marijuana. The Crime Laboratory Division of the State Laboratories Department subsequently determined that the plant material in these five bags was marijuana. Evidence of these facts was received in Ennis' trial.

However, prior to Ennis' trial, defense counsel filed a written motion to suppress the five bags of plant material discovered during the search of Ennis' home on the basis that the affidavit underlying the search warrant contained a number of material misrepresentations and that the information in such affidavit was stale. At a subsequent hearing on this motion, counsel orally

requested an evidentiary hearing to challenge the veracity of Quickstad's affidavit. The court granted counsel's request.³ Subsequent to these hearings, the trial court denied Ennis' motion to suppress the evidence.

At the evidentiary hearing, Quickstad testified that he had no knowledge as to how the informant concluded that ". . . Ed Ennis had 10lbs [sic] of Marijuana in his home on April 7, and has been selling Marijuana from this 10 lbs." Quickstad admitted that he did not question the informant as to whether he obtained his information by either seeing the marijuana or hearing of the marijuana firsthand from Ennis. upon scrutinizing the record, we are of the opinion that Quickstad had worked with the informant on prior occasions, believed him to be reliable, and consequently accepted his conclusory

statement that Ennis had marijuana in his home which was for sale without inquiring as to the basis of the informant's knowledge.

The questions presented by this factual situation are:

Whether or not the affiant's statement in the search warrant affidavit with regard to how the informant obtained his information should be set aside; and, if so, whether or not the affidavit's remaining content is sufficient to establish probable cause.

The veracity of an affiant's statements in a warrant affidavit can be challenged pursuant to the guidelines set forth in

Franks v. Delaware:

"[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the

allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." 438 U.S. 154, 155-56, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667, 672 (1978).

For the purpose of applying the test enunciated in Franks, a false affidavit statement is a statement which misleads the neutral and detached magistrate into believing that the stated facts exist, which facts in turn affect his evaluation of whether or not there is probable cause. State v. Groff, 323 N.W.2d 204, 210 (Iowa 1982).

Upon reviewing the record in the case at bar, we believe Quickstad's testimony at the evidentiary hearing reveals that he

knowingly and intentionally asserted that his informant told him that Ennis had told the informant that Ennis had marijuana for sale when in fact Quickstad had failed to ask the informant how he obtained such information. Specifically, Quickstad testified as follows:

"BY MR. KURZMAN:

". . . What do you claim the informant told you the morning of April 7?

"A. Since I didn't write the conversation down verbatim, I can only speculate that he came in and told me, 'Mr. Ennis has ten pounds for sale. He has it at his house.'

"Q. And you, of course, then said, 'How do you know that information?' Right?

"A. I don't recall whether I did or not.

* * * *

"BY MRS. SCHMITZ:

"Q. What was the conversation, Mr. Quickstad?

"A. Again, as far as I can recollect, he said that Ed Ennis had the ten

pounds of marijuana for sale. I don't recall asking him or whether he had seen it or whether Mr. Ennis had told him personally. He said, 'Mr. Ennis has the ten pounds for sale.'"

Thus, the statement in question which Quickstad attributed to the informant was merely an assumption on his part and not a statement by the informant. This statement is false because it is a bald assertion devoid of factual support which mislead the magistrate into believing that he knew the underlying circumstances from which the informant concluded that ". . . Ed Ennis had 10lbs [sic] of Marijuana in his home on April 7, and has been selling Marijuana from this 10 lbs." Hence, in accordance with the dictates of Franks, we are required to set this statement aside and ascertain whether or not the remainder of the affidavit is sufficient to establish probable cause.

In making this determination, we will not consider affidavit paragraphs (1), (2), and (3) inasmuch as the information presented in such paragraphs was approximately six months old at the time the warrant was issued and, therefore, stale. Upon eliminating both the stale information and the false information, the sole statement remaining in the affidavit is:

"March of 82, a Confidential informant who has given information in the past leading to under cover purchases of drugs and who has given information known by Jim Quickstad to be true and reliable about Drug Dealers told to Jim Quickstad that Ed Ennis had 10lbs [sic] of Marijuana in his home on April 7, and has been selling Marijuana from this 10 lbs."

The foregoing statement consists of information relayed to Quickstad by his informant. When an affidavit is based on hearsay information as in this instance, probable cause must be determined in accordance with

the dictates of Aguilar v. Texas:

"Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, Jones v. United States, 362 U.S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 376 U.S. 528, was 'credible' or his information 'reliable.'" (Footnote omitted). 378 U.S. 108, 114, 84 S.Ct. 1509, 1514, 12 L.Ed.2d 723, 729 (1964).

The Basis of Knowledge Prong of this analytical framework, known as the Aguilar Two-pronged Test, requires that the magistrate be informed of how the informant obtained his information. State v. Schmeets, 278 N.W.2d 401, 406 (N.D. 1979).

It is evident that the statement which we found to be false and eliminated from the search warrant affidavit details the

circumstances from which the informant concluded that Ennis had marijuana in his home which was for sale. Without this statement, the affidavit fails to satisfy the Aguilar Basis of Knowledge Test. As the magistrate was mislead, the warrant was not issued upon probable cause and, accordingly, the contraband seized during the search of Ennis' home should have been suppressed pursuant to defense counsel's motion.⁴ Evidence of the five pounds of marijuana was necessary to convict Ennis of possession of marijuana with intent to deliver. We therefore reverse Ennis' conviction on this count.

II. INSUFFICIENCY OF EVIDENCE TO
SUSTAIN ENNIS' CONVICTION OF
DELIVERING CONTROLLED SUBSTANCES

At Ennis' trial, Rene' and Kevin Ostberg testified that Ennis supplied them with the marijuana and hashish which they ultimately sold to special agent Paul Bazzano on September 2, 9, 23, and 28, 1981. Subsequent thereto, Ennis was charged with and convicted of delivering controlled substances, hashish and marijuana, to Rene' and Kevin Ostberg on the aforementioned dates. Ennis was not charged with delivering marijuana or hashish to special agent Buzzano.

Ennis contends that the evidence introduced by the State was insufficient to sustain his convictions of delivering marijuana and hashish to Rene' and Kevin ostberg on the dates in question. His argument in this respect is twofold. First, he argues that Rene' and Kevin Ostberg were

accomplices of Ennis; and, second, that the evidence adduced at trial was insufficient to corroborate their testimony as accomplices.

to adjudicate this issue, we must first ascertain whether or not Kevin and Rene' Ostberg were accomplices of Ennis. The test to determine whether or not one is an accomplice of a defendant on trial is ". . . whether or not he could be indicted and punished for the crime for which the defendant is charged." State v. Dwyer, 172 N.W.2d 591, 596 (N.D. 1969); State v. Noel, 66 N.D. 676, 680, 268 N.W. 654, 656 (1936).

In the case at bar, Rene' and Kevin Ostberg could be charged with delivering marijuana and hashish to special agent Buzzano. However, common sense dictates that they could not be charged, as Ennis was, with delivering controlled substances to Rene' and

Kevin Ostberg. Hence, Ennis' assertion fails.

Ennis also contends that the evidence introduced by the State was insufficient to identify the substances delivered as "marijuana" or "hashish."⁵ The record is replete with conflicting expert-witness testimony concerning identification of the substances. The State's expert witness, Aaron Rash, Supervisor of the Crime Laboratory Division of the State Laboratories Department, testified that he performed four laboratory tests upon the samples in question: microscopic identification; Duquenois-Levine; thin layer chromatography; and infrared spectroanalysis. According to Rash, each of these tests indicated that the substances were marijuana or hashish.

The defense attempted to undermine

Rash's testimony by emphasizing that Rash has limited botanical training; and, therefore, he was not qualified to make a conclusive microscopic identification when numerous plants have the same characteristics as the plant Cannabis from which marijuana is derived. In addition, the defendant's expert witness, Dr. Fullerton, testified that the Duquenois-Levine test is nonspecific and inaccurate because numerous plants contain the chemical resorcinol which triggers a positive reaction in the test. Dr. Fullerton also stated that the four spectra charts used in the infrared spetroanalysis were neither internally consistent nor consistent with the reference spectra.

The crux of Dr. Fullerton's testimony was that, based on the State Laboratory's analysis, it is impossible to positively

identify the substances as marijuana or hashish. However, on cross-examination, Dr. Fullerton admitted that he was not stating nor could he state that the substances analyzed were not marijuana or hashish.

We are reluctant to reverse the factual findings of a trial court with regard to disputed questions of fact. State v. Olmstead, 246 N.W.2d 888, 890 (N.D. 1976), cert. denied, 436 U.S. 918, 98 S.Ct. 2264, 56 L.Ed.2d 759 (1978). We will not substitute our judgment for that of the trial court if the trial judge's factual determinations are supported by substantial evidence. Olmstead, supra, 246 N.W.2d at 890; State v. Champagne, 198 N.W.2d 218, 226 (N.D. 1972); State v. Larson, 61 N.W.2d 274, 275 (N.D. 1953).

Determining whether or not the substances in question were marijuana or

hashish was the exclusive function of the trier of fact, the trial judge. The defense presented strong contradictory evidence, all of which was directed toward proving that Aaron Rash was inept and that the tests performed in the State Laboratory were both inadequate and inconclusive. Defense counsel, however, did not offer evidence of independent tests performed by an expert in which the substances were shown to not be marijuana or hashish.

Where the trial court heard the experts testify, observed their demeanor, and judged their credibility, and where there is substantial competent evidence to support the court's factual determination, we conclude that the defendant failed to leave us ". . . with a definite and firm conviction that a mistake has been committed." Olmstead,

supra, 246 N.W.2d at 890. That is the situation in this case as to the existence of the controlled substance.

III. CONSTITUTIONALITY OF CLASSIFYING
MARIJUANA AS A SCHEDULE I DRUG

Ennis' final contention is that the trial court erroneously denied his motion to dismiss on the basis that classifying marijuana in Schedule I of the Uniform Controlled Substances Act, Chapter 19-03.1, N.D.C.C., violates his Fifth Amendment rights to equal protection and due process. Defendant's constitutional challenge is premised on the theory that, pursuant to statutory definition, it is permissible to classify marijuana as a Schedule I drug only if it "has [a] high potential for abuse" and "has no accepted medical use . . . or lacks

accepted safety for use in treatment . . .

."6 Specifically, Ennis asserts that classifying marijuana as a Schedule I drug is arbitrary and irrational as the classification no longer bears a rational relationship to a legitimate governmental interest because: (1) governmental studies conducted subsequent to the enactment of the Uniform Controlled Substances Act reveal that marijuana does not have a "high potential for abuse"; and, (2) marijuana is currently used safely in the treatment of cancer and glaucoma. Ennis relies upon case authority which stands for the proposition that: "the constitutionality of a statute predicated upon a particular state of facts may be challenged by a showing to the court that those facts have ceased to exist." United States v. Carolene Products Co., 304 U.S.

144, 153, 58 S.Ct. 778, 784, 82 L.Ed. 1234 (1938).

Recent studies may have dispelled the myths that marijuana is an addictive narcotic and generally a stepping-stone to more serious drugs.⁷ See, Nat. Org. for Reform of Marijuana Laws v. Bell, 488 F.Supp. 123, 129 (1980). However, as the United States District Court said in Nat. Org. for Reform of Marijuana Laws v. Bell: "Studies indicate that marijuana may impair the circulatory, the endocrine, and the immunity systems of the body, alter chromosomes and change cell metabolism."⁸ 488 F.Supp. at 136. Furthermore, a recent bulletin from the United States Department of Justice reveals that "a fourth of all burglaries and roughly a fifth each of all robberies and all drug offenses were committed under the influence

of marijuana." Bureau of Justice Statistics Bulletin, Prisoners and Drugs (March 1983). Thus, without attempting to restate all the arguments pro and con on this subject, we conclude, based on the record before us and our research, that the experts strongly disagree as to whether or not marijuana "has [a] high potential for abuse." Furthermore, we do not believe that the questions of whether or not marijuana "has no accepted medical use . . . or lacks accepted safety for the use in treatment" can be resolved by the simple fact that some states may now be experimenting with the use of marijuana as a prescriptive drug under very limited circumstances. See, State v. Whitney, 96 Wash.2d 578, 637 P.2d 956 (1981).⁹

In Carolene Products Co., the United States Supreme Court unequivocally said that

when a court is asked to review the judgment of a legislative body, it should exercise a policy of judicial restraint:

"[I]nquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for [the classification]. Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable. . . . As that decision was for Congress, neither the findings of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it." 304 U.S. at 154, 58 S.Ct. at 784-85.

Our court has on prior occasion recognized and followed this policy of judicial restraint: "This court will not substitute its judgment for that of the legislative body which has the primary duty and responsibility of determining a question where the question is fairly debatable." State v. Boushee, 284

N.W.2d 423, 432 (N.D. 1979).

Accordingly, because the issue of whether or not marijuana is properly classified as a Schedule I drug is fairly debatable, we will not usurp the legislature's factfinding function. In essence, we conclude as did the three United States District Judges in Nat. Org. for Reform of Marijuana Laws v. Bell, that "[t]he continuing questions about marijuana and its effects make the classification rational."¹⁰ 488 F.Supp., supra at 136.

Finally, pursuant to Section 19-03.1-02, N.D.C.C.,¹¹ the North Dakota State Laboratories Department has the authority to reclassify marijuana. This statutory provision provides a sensible mechanism for ". . . dealing with a field in which factual claims are conflicting and the

state of scientific knowledge is still growing." United States v. Kiffer, 477 F.2d 349, 357 (2d Cir. 1973), cert. denied, 414 U.S. 831, 38 L.Ed.2d 65, 94 S.Ct. 165 (1973). As the Second Circuit further stated in

Kiffer:

" . . . [T]he very existence of the statutory scheme indicates that, in dealing with this aspect of the 'drug' problem, Congress intended flexibility and receptivity to the latest scientific information to be the hallmarks of its approach. This . . . is the very antithesis of the irrationality appellants attribute to Congress." 477 F.2d supra at 357.

Incidentally, a reasonable argument can be made and has been made that the statutory criteria asserted by Ennis are not intended to be exclusive.¹²

We conclude that it cannot reasonably be said that classifying marijuana as a Schedule I drug bears no rational relationship to the legitimate State interest

of controlling drug abuse. Boushee, supra,
284 N.W.2d at 432.

In accordance with the foregoing
opinion, we reverse Ennis' conviction for
possessing marijuana with the intent to
deliver and affirm the remaining four
convictions.

[Signed by:]

Joseph J. Erickstad, C.J.

Gerald W. Vande Walle

Vernon R. Pederson

H. L. Paulson

¹ The probable cause section of Quickstad's affidavit reads in its entirety as follows:

- "1. In the Fall of 1981 Renae Ostberg stated to Drug Enforcement Agent Buzzano that Ed always has good hash.
- "2. Ed Ennis was seen by Police Officers coming [sic] to the Ostbergs home just pryor [sic] to Agent Buzzano buying Hashish.
- "3. A search of Ed Ennis home Revealed numerous bottles of Counterfeit Drugs.
- "4. March of 82, a Confidential informant who has given information in the past leading to under cover purchases of drugs and who has given information known by Jim Quickstad to be true and reliable about Drug Dealers told to Jim Quickstad that Ed Ennis had 10lbs [sic] of Marijuana in his home on April 7, and has been selling Marijuana from this 10 lbs. Ed Ennis told the confidential informant that the 10 lbs of marijuana were at his home at 1309 24th stW and could be bought there"

2 The bags weighed 454.2, 455.2, 454.6, 454.1, and 454.5 grams respectively.

3 The following colloquium between Mr. Kurzman, defense counsel, Mrs. Schmitz, Assistant State's Attorney, and the trial court, indicates that the trial court granted Mr. Kurzman's request for an evidentiary hearing to challenge the veracity of Quickstad's sworn statements:

"MR. KURZMAN: . . . we have a statement here in Paragraph Four . . . 'Ed Ennis told the confidential informant that ten pounds of marijuana were at his home and could be bought there.' Actually, Lieutenant Quickstad says, this is when he testified under oath on April 20, 1982, at Page Eight of that transcript, he said he didn't know what the basis was. He didn't know how the informant came to the knowledge that there was allegedly marijuana at Ennis' house. . . .

"At Pages 18, 19, and 20, he says he has no idea of the basis of knowledge for the informant, . . .

"[U]nder the Franks case, the defendant must show first, the likelihood of material misrepresentations of fact or reckless disregard for the truth; and then, if the defendant can show that, the which constitute those

misrepresentations of fact or which evidence reckless disregard for the truth are taken out of the Affidavit, and it is then read to see if probable cause exists without those statements. We would submit without the statements that we have indicated to this Court, . . . [T]here is no probable cause upon which the warrant could be issued, . . .

* * * * *

"We would request, therefore, a hearing, and, if the State wishes to call witnesses relative to these alleged misstatements or statements in reckless disregard of truth, of course, we will cross-examine at that time. . . .

"MRS. SCHMITZ: . . .

"I would be happy to call the affiant, Quickstad, and he is present; . . .

"I would submit to the Court that One, Two, and Three, possibly, and relate on their face, that these One, Two, and Three are old. They are things that have happened in the past. . . .

* * * * *

"MR. KURZMAN: Your Honor, we would submit . . . that the sworn testimony of Lieutenant Quickstad which are directly contrary to the search and the Affidavit is sufficient offer of proof as to the possibility of the misstatements or fabrications.

★ ★ ★ ★ ★

"THE COURT: Do you wish to call Mr. Quickstad?

"MRS. SCHMITZ: I'll call him, Your Honor."

The State does not contend that the trial court erred in granting Ennis' request for an evidentiary hearing; therefore, we will not address that point on appeal.

4 The affidavit and search warrant in question were prepared by the Williams County Sheriff's Office independent of the Williams County States Attorney.

5 Ennis asserts that the trial court had a reasonable doubt regarding identification of the substances in question which doubt mandates a reversal. However, we must remind counsel of the exact language utilized by the trial court:

"He's also guilty beyond a reasonable doubt, there is a doubt, but not

beyond a reasonable doubt. And my only doubt is in the chemical analysis; that bothered me some, but it's not beyond a reasonable doubt"

Upon analyzing this statement, we believe the testimony of defendant's expert, Dr. Fullerton, created some question in the trial court's mind; however, such conflicting evidence did not create a "reasonable doubt."

6 The statutory provision in question is Section 19-03.1-04, N.D.C.C.:

"19-03.1-04. Schedule I tests.

The department shall place a substance in schedule I if it finds that the substance:

1. Has high potential for abuse;
and
2. Has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision."

7 Marihuana & Health: Fifth Annual Report to the United States Congress from the Secretary of Health, Education, and Welfare 3 (1975), at 91; Decriminalization of Marihuana: Hearings Before the House Select Committee on Narcotics Abuse & Control, 95th Congress, 1st Sess. 423-38 (1977).

8 See pp. 128-130 of Nat. Org. for Reform of Marijuana Laws v. Bell, 488 F.Supp. 123 (1980) for a full discussion of marijuana's effects.

9 In Whitney, the Washington Supreme Court said that removing marijuana from Schedule I and placing it in Schedule II for the purpose of researching its effect on the treatment of cancer and glaucoma patients ". . . does not mean that the legislature has found that the drug does not have a high potential for abuse or that it has an accepted medical use and is safe for use in treatment under medical supervision." Whitney, 96 Wash. 2d, supra at 583, 637 P.2d, supra at 960. The court further stated that "[t]he retention of the drug in schedule I for purposes other than the research program cannot reasonably be said to bear no rational relation to a legitimate legislative purpose." Whitney, 96 Wash. 2d, supra at 583, 637 P.2d, supra at 960.

10 It is interesting to note that the federal Controlled Substances Act enacted in 1970 and upon which the North Dakota Controlled Substances Act is based classified marijuana as a Schedule I drug. 21 U.S.C. § 812. FURTHERMORE, THE U.S. ATTORNEY GENERAL HAS NOT SEEN FIT TO RECLASSIFY MARIJUANA PURSUANT TO ITS STATUTORY AUTHORIZATION. 21 U.S.C. §§ 811-812.

11

The statutory provision in question reads in relevant part as follows:

"19-03.1-02. Authority to control.

"1. The North Dakota state laboratories department shall administer this chapter and may add substances to or delete or reschedule all substances enumerated in the schedules in sections 19-03.1-05, 19-03.1-07, 19-03.1-09, 19-03.1-11, or 19-03.1-13 pursuant to the procedures of chapter 28-32. In making a determination regarding a substance, the department shall consider the following:

- a. The actual or relative potential for abuse;
- b. The scientific evidence of its pharmacological effect, if known;
- c. The state of current scientific knowledge regarding the substance;
- d. The history and current pattern of abuse;
- e. The scope, duration, and significance of abuse;
- f. The risk to the public health;
- g. The potential of the substance to produce psychic or physiological dependence liability; and

h. Whether the substance is an immediate precursor of a substance already controlled under this chapter.

- "2. After considering the factors enumerated in subsection 1, the department shall make findings with respect thereto and issue a rule controlling the substance if it finds the substance has a potential for abuse.

★ ★ ★ ★ ★

- "4. If any substance is designated, rescheduled, or deleted as a controlled substance under federal law and notice thereof is given to the department, the department shall similarly control the substance under this chapter after the expiration of thirty days from publication in the federal register of a final order designating a substance as a controlled substance or rescheduling, or deleting a substance, unless within that thirty-day period, the department objects to inclusion, rescheduling, or deletion. In that case, the department shall publish the reasons for objection and afford all interested parties an opportunity to be heard. At

the conclusion of the hearing, the department shall publish its decision, which shall be final unless altered by statute. Upon publication or objection to inclusion, rescheduling, or deletion under this chapter by the department, control under this chapter is stayed until the department publishes its decision." § 19-03.1-02, N.D.C.C.

12 In Nat. Org. for Reform of Marijuana
Laws v. Bell, the United States District
Court said:

"The House report states that '[a]side from the criterion of actual or relative potential for abuse, subsection (c) of section 201 [21 U.S.C. § 811(c)] lists seven other criteria . . . which must be considered in determining whether a substance meets the specific requirements specified in section 202(b) [21 U.S.C. § 812(b)] for inclusion in particular schedules ' 1970 House Report, supra at 35, reprinted in [1970] U.S.Code Cong. & Admin.News at 4602. The criteria listed in section 811(c) include the state of current knowledge, the current pattern of abuse, the risk to public health, and the significance of abuse. These more subjective factors significantly broaden the scope of

issues to be considered in classifying a drug. Given these other concerns, Congress might well want marijuana in Schedule I for regulatory purposes. Such a classification carries heavier penalties for sale, distribution, and importation, thus aiding law enforcement officials in their effort to reduce the supply of marijuana." (Footnote omitted). 488 F.Supp. at 140-141.

Criminal Nos. 885, 895-898

State v. Ennis

SAND, Justice, concurring specially.

While the majority opinion correctly identifies the United States Supreme Court case law on search and seizure which we are obligated to follow, I have reservations regarding the manner those principles of law have been applied to the facts of this case. The principal issue is whether or not probable cause existed for the search of the home and the seizure of the alleged marijuana. The opinion correctly points out that the statement by the informant does not disclose how the informant obtained the information, whether it was the result of personal observation, or whatever, and

neither did the officer to whom the statement was given ask the informant the basis for his statement. While the statement may not provide probable cause for a search warrant, it is not false merely because it is a "bald assertion devoid of factual support."

According to the briefs, the record does not reflect that the statement was knowingly and intentionally given with reckless disregard for the truth. The statement may not be reliable or sufficient for a search warrant because it was inadequate and was not followed up with appropriate questions and the officer's recollection was poor, but that does not make it false under the holding of Franks v. Delaware, cited in the majority opinion.

The majority opinion, in discussing the issue of probable cause, makes frequent

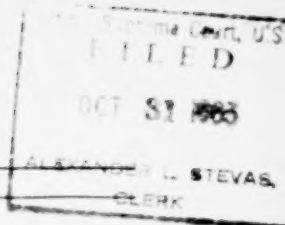
reference in one form or another to the contents of the informant's statement, "Ed Ennis had 10 lbs. of Marijuana in his home on April 7, and has been selling Marijuana from this 10 lbs." [Emphasis added.] This, without any qualification, may suggest that in establishing probable cause valid information must be submitted that marijuana is at a certain place and is being sold. If selling is an integral part of the rule of law the opinion tends to convey, then I must disagree because the opinion would be adding unnecessary criteria to the probable cause requirement. In my opinion, the sale or sales need not be established to justify the issuance of a search warrant for a controlled substance. Mere possession of marijuana, a controlled substance, in violation of NDCC § 19-03.1-23(3) is a crime. However, I agree

that the statement by the informant does not disclose how or on what basis he acquired the information and as such the information is questionable and is legally inadequate to justify the issuance of a search warrant. If the informant had been properly questioned, it is possible that the informant may have had the necessary information and would have provided appropriate answers which would have made the information sufficient to justify a search warrant. But this was not done.

[Signed by:]

Sand, Justice

No. 83-234



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1982 TERM

EDWARD ENNIS,

Petitioner,

vs.

STATE OF NORTH DAKOTA,

Respondent.

REPLY TO
PETITION FOR WRIT OF CERTIORARI ON APPEAL
FROM THE SUPREME COURT OF NORTH DAKOTA

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REPORTS OF OPINIONS DELIVERED

IN THE COURTS BELOW

The opinion of the Supreme Court
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IN THE
SUPREME COURT OF THE UNITED STATES
No. 83-234
OCTOBER 1982 TERM

EDWARD ENNIS,

Petitioner,

vs.

STATE OF NORTH DAKOTA,

Respondent.

STATEMENT OF CASE

The petitioner Edward Ennis was charged on April 8, 1982 with one count of unlawful possession of marijuana with intent to deliver, and four counts of unlawful delivery of hashish or marijuana, in violation of North Dakota Century Code provisions. Petitioner was convicted of all five charges at a bench trial before the Honorable Bert L. Wilson.

At trial there was only one witness who testified as to what the substances were in each case, and that was the state's expert witness, Aaron Rash, the supervisor of the North Dakota Crime Laboratory. (Transcript 216 and 240)¹. He positively identified the substances as marijuana and hashish (Transcript 240) and stated he relied on four laboratory tests to identify the samples; (1) Microscopic examination; (2) Duquenois-Levine; (3) Thin-layer chromatography; and (4) Infrared spectroanalysis. (Transcript 223).

The defense presented an expert witness, Dr. Dwight Fullerton who has testified as an expert witness in about twenty states and had collaborated with defense counsel, Marc Kurzman, on several articles. (Transcript 329 - 331). Dr. Fullerton, in his testimony, tried to discredit some of the analysis which

¹ Transcript 216 indicates transcript at page 216.

Aaron Rash had performed. (Transcript 323 - 361 and 367 - 396 and 413 - 414). Dr. Fullerton specifically stated he had not run any tests on the marijuana. (Transcript 388). In addition he testified that he could not state that the substance was not hash or marijuana. (Transcript 394). Hence, only the state's expert, Aaron Rash testified as to what the substances were. He testified that the substances were marijuana and hashish. (Transcript 240).

Judge Wilson found the defendant guilty of all five charges. Judge Wilson stated:

"He's also guilty beyond a reasonable doubt, there is a doubt, but not beyond a reasonable doubt." (Transcript 439).

Defense counsel did not make any objection or comment to the language the Court used. (Transcript 439 - 440).

Petitioner's motion for a new trial was denied and he was sentenced to imprisonment for seven years with four years suspended and fined five thousand dollars. The sentences were to run concurrently.

On appeal, the petitioner asserted, inter alia that the evidence introduced by the state was insufficient to identify the substances as marijuana or hashish and

"With regard to the identification, of substances sold and or seized as "marijuana", the trial judge's doubts were reasonable and mandated an acquittal."

[See Appendix page A-1] (Table of Contents, Brief of Appellant on Appeal to the Supreme Court of North Dakota in State v. Ennis Criminal numbers 885, 895, 896, 897, & 898.)

The Supreme Court of North Dakota reversed Petitioner's conviction on the possession with intent to deliver a controlled substance and affirmed the four delivery charges. State v. Ennis, 334 N.W.2d 827, 836 (N.D. 1983) the Supreme Court of North Dakota stated.

(10) We are reluctant to reverse the factual findings of a trial court with regard to disputed questions of fact. State v. Olmstead, 246 N.W.2d 888, 890 (N.D. 1976), cert. denied, 436 U.S. 918, 98 S.Ct. 2264, 56 L.Ed.2d 759 (1978). We will not substitute our judgment for that of the trial court if the trial judge's factual determinations are supported by substantial evidence. Olmstead, supra, 246 N.W.2d at 890; State v. Champagne, 198 N.W.2d 218, 226 (N.D. 1972); State v. Larson, 61 N.W.2d 274, 275 (N.D. 1953).

Where the trial court heard the experts testify, observed their demeanor, and judged their

credibility, and where there is substantial competent evidence to support the court's factual determination, we conclude that the defendant failed to leave us "... with a definite and firm conviction that a mistake has been committed." Olmstead, supra, 246 N.W.2d at 890. That is the situation in this case as to the existence of the controlled substance.

State v. Ennis, 334 N.W.2d at 833.

Petitioner asked for a rehearing on the basis that the Court "unfairly shifted the burden of proof to the defendant." (Page 5 of Petition for Rehearing). The Petition was denied and Petitioner is now before this Court requestings a writ of Certiorari.

ARGUMENT

1. THE NORTH DAKOTA SUPREME COURT REVIEWED THE RECORD AND FOUND SUBSTANTIAL EVIDENCE TO SUPPORT THE IDENTIFICATION OF THE SUBSTANCES AND DID NOT SHIFT ANY BURDEN OF PROOF TO THE PETITIONER.

The petitioner substantially misstates the facts upon which the North Dakota Supreme Court placed reliance. There can be no doubt that the burden of proof rests upon the state and may not be shifted, even in the slightest, to the defendant. Wilbur v. Mullaney, 496 F.2d 1303, 1307 (1st Cir. 1974), Affirmed 421 U.S. 684 (1975). It is so axiomatic and fundamental that it is inconceivable that the North Dakota Supreme Court would place such a burden on the defendant and it is clear that the North Dakota Supreme Court did not do that in this case.

The reviewing Court's function with respect to factual findings is to ensure that the findings are supported by substantial evidence and where they are the Court will not substitute its judgment for that of the Trial Court.

State v. Olmstead, 246 N.W.2d 888, 890 (N.D. 1976), cert. denied, 436 U.S. 918, 98 S.Ct. 2264, 56 L.Ed.2d 759 (1978).

In this case the North Dakota Supreme Court identified the substantial evidence it was relying on as follows:

"The state's expert witness, Aaron Rash, Supervisor of the Crime Laboratory Division of the State Laboratories Department, testified that he performed four laboratory tests upon the samples in question: microscopic identification; Duquenois-Levine; thin layer chromatography; and infrared spectroanalysis. According to Rash, each of these tests indicated that the substance were marijuana or hashish."

Ennis, supra, 334 N.W.2d at 833. The Court then stated that the defense presented evidence in an "attempt to undermine Rash's testimony". Id. at 833. The Court recognizing the fact that only one expert testified as to what the substance was, stated that the defense expert "admitted that he was not stating nor could he state that the substances analyzed were not marijuana or hashish." Id. at 833. The North Dakota Supreme Court obviously was pointing out that there was no evidence directly conflicting with the state's expert's opinion that the substances were marijuana and hashish. Hence, there was no shifting of the burden to the defendant. The defense may introduce substantial amounts of evidence asserting that

the basis for Rash's opinion may not allow positive identification of the substances through their expert witness, but the Reviewing Court does not substitute its judgment for that of the Trial Court when the record reveals substantial evidence in support of the verdict.

In this case the North Dakota Supreme Court detailed the evidence it determined to be substantial, that being that the state's expert, Aaron Rash, Supervisor of the Crime Laboratory performed four laboratory tests on the substances and that each test indicated to him that the substances were in fact marijuana or hashish. Id. at 833. The

North Dakota Supreme Court underscored this substantial evidence with the fact that only one of the experts testified as to what the substances were and that the

other did not and hence there was not only substantial evidence to support the factual element of identity of a controlled substance but the only evidence at trial indicated that the substances were marijuana or hashish.

The North Dakota Supreme Court reviewed the record and determined that there was substantial evidence, underscoring that determination as to the identification of the substances by stating that only one expert and not the other stated an opinion as to the actual identification of substances and did not shift any burden of proof to the petitioner.

As there was no shifting of the burden of proof and the presumption of innocence was not impinged there

was no denial of his due process rights under the Fourteenth Amendment to the United States Constitution.

II. THE TRIAL COURT APPLIED THE CORRECT STANDARD OF "PROOF BEYOND A REASONABLE DOUBT" OF GUILT.

This is the first time the petitioner has raised the issue as stated in his brief as follows:

BY REQUIRING THAT THE EVIDENCE RAISE MORE THAN A REASONABLE DOUBT OF PETITIONER'S INNOCENCE, THE TRIAL COURT COMMITTED PLAIN ERROR AND VIOLATED PETITIONER'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION. (Petitioner's Brief page 22.)

In his brief on appeal to the Supreme Court of North Dakota petitioner stated the following issue:

- B. With regard to the identification of substances

sold and or seized as
"marijuana", the trial
judge's doubts were
reasonable and mandated
an acquittal."

[See Appendix page A-1] (Table of Contents,
Brief of Appellant on Appeal to the Supreme
Court of North Dakota in State v. Ennis
Criminal numbers 885, 895, 896, 897, &
898.)

In his argument before the North
Dakota Supreme Court the petitioner
argued that the testimony and evidence
concerning identification of the substances
did raise reasonable doubts in the Trial
Court's mind. Petitioner's argument
clearly centered around sufficiency
of the evidence to raise doubt in the
Trial Court's mind and did not encompass
what he now wishes to assert for the first
time before this Court, that the Trial

Court was requiring that the defense raise more than a reasonable doubt. (Appendix at A-1, Table of Contents from Petitioner's Brief on appeal to the Supreme Court of North Dakota.)

In this case the Supreme Court of North Dakota, the State Court of last resort in North Dakota, did not have an opportunity to decide either a federal question or an important question of federal law. In which case there is no jurisdiction of this Court over the question petitioner would now wish to assert for the first time. (Rules of the Supreme Court, Rule 17 1 (a) & (b).)

Generally, where the Supreme Court of a state does not consider that a question involving violation of the

Constitution of the United States was raised in a case; and passes no opinion on it, the Supreme Court of the United States will not pass on it. Bartemeyer v. State of Iowa, 85 U.S. 129 (1873).

This rule appears flexible for consideration of exceptional cases. Youakim v. Miller, 425 U.S. 231, 234 (1976). The question presented by petitioner does not appear to be exceptional as there is no conflicting application of constitutional law, merely a factual interpretation of a judge's comments when he rendered a verdict. Pursuant to petitioners failure to assert this question before the Supreme Court of North Dakota the respondent would assert that it should not now be heard before this Court.

Should the Court wish to address this question, however, the respondent shall address it on its merits. In asserting this question the petitioner leaves out the Trial Court's most applicable comment. When petitioner asserted the question of whether or not the Court's doubt was reasonable he also failed to state the Court's entire response, and states only part of the Court's response, which is misleading. The Supreme Court of North Dakota used the entire response in the following footnote:

5. Ennis asserts that the trial court had a reasonable doubt regarding identification of the substances in question which doubt mandates a reversal. However, we must remind counsel of the exact language utilized by the trial court: "He's also guilty

beyond a reasonable doubt. And my only doubt is in the chemical analysis; that bothered me some, but it's not beyond a reasonable doubt...."

Upon analyzing this statement, we believe the testimony of defendant's expert Dr. Fullerton, created some question in the trial court's mind; however, such conflicting evidence did not create a "reasonable doubt".

Ennis, supra, at 833.

It is clear that Judge Wilson applied the proper standard, guilt beyond a reasonable doubt. Furthermore the Supreme Court of North Dakota could not have erred as alleged in petitioner's brief at page 26 as it did not have the opportunity to address the issue petitioner now raises.

CONCLUSION

For the reasons set forth above, respondent respectfully asks that this Court deny the petition for a writ of certiorari and enter an order to that affect.

Respectfully submitted,

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